US Army Corps of Engineers
Seattle District

Compensatory Mitigation by In-Lieu Fee

An Introduction for Project Managers

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The Seattle District is taking its first steps in developing an in-lieu fee (ILF) program that will provide Department of the Army permit applicants an additional method of compensating for the adverse impacts of their projects on the aquatic environment. This paper provides an introduction to ILF mitigation and a brief description of how an ILF program might be implemented in the Seattle District. The answers to some frequently asked questions (FAQs) and suggestions for additional reading are also included.

Compensatory Mitigation and the USACE Regulatory Program

The U.S. Army Corps of Engineers (USACE) administers a Regulatory Program that carries out the Secretary of the Army's responsibilities under Section 10 of the Rivers and Harbors Act (RHA) of 1899, Section 404 of the Clean Water Act (CWA), and other laws. This program is the primary federal tool for protecting wetlands and other aquatic resources of the United States. The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pursuant to this goal, the USACE, under Section 404 of the CWA, regulates the discharge of dredged and fill material into waters of the United States, including wetlands (33 CFR Parts 320-331). Under Section 10 of the RHA, the USACE regulates most structures and work in or affecting navigable waters of the United States. While the USACE has the primary responsibility for administering this regulatory program, other natural resource agencies, including the Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service, National Marine Fisheries Service, Washington State Department of Ecology, and Washington Department of Fish and Wildlife play important regulatory and advisory roles.

A fundamental precept of the regulatory program is the Department of the Army's mitigation policy (33 CFR Part 320.4 (r)), which applies to all regulatory program authorizations, including general permits. Mitigation includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses, as well as avoiding the loss of aquatic resources to the extent practicable. Department of the Army mitigation policy requires that mitigation be considered throughout the permit application review process. The district engineer has the authority to require all appropriate and practicable mitigation necessary to minimize adverse project impacts, ensure that the project will not be contrary to the public interest, and satisfy such legal requirements as the Section 404(b)(1) guidelines. In the case of nationwide and other general permits, the district engineer may, on a case-by-case basis, add any special condition necessary to ensure that the proposed activity would have only minimal individual and cumulative adverse effect on the environment, not be contrary to the public interest, and comply with all terms and conditions of the general permit. This includes special conditions requiring a permittee to implement appropriate and practicable compensatory mitigation.

The USACE has gradually come to recognize that "consolidated" approaches to mitigation, including mitigation banking and ILF mitigation, can provide highly effective compensation for the adverse environmental impacts of USACE-authorized activities in waters of the United States. Consolidated mitigation differs from project-specific mitigation in that it combines the compensatory mitigation for multiple USACE-authorized projects into a single larger-scale mitigation project. The USACE first acknowledged that consolidated mitigation, in the form of mitigation banking, may be an acceptable form of compensatory mitigation in "Memorandum of Agreement (MOA) between the EPA and the Department of

the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines" (February 6, 1990). Recognizing the ever-increasing importance of consolidated mitigation to its regulatory program, the USACE subsequently issued "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks" in 1995 and "Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" in 2000. The USACE further embraced consolidated mitigation with the issuance of eleven new and modified nationwide permits on March 9, 2000 (65 FR 12818-12899). The new and modified nationwide permits include a revised General Condition 19, which states in part that "consolidated mitigation approaches, such as mitigation banks, will be the preferred method of providing compensatory mitigation." Thus, for minor impact activities, such as those authorized by nationwide permit, the USACE believes that, in most cases, consolidated mitigation can provide compensation that is better for the aquatic environment than project-specific compensatory mitigation.

On October 31, 2001, the USACE issued a regulatory guidance letter, RGL 01-1, that endorses taking an ecosystem (e.g., watershed-scale) approach to mitigation; encourages consideration of a watershed's ecological needs when determining appropriate mitigation; recognizes that mitigation projects tend to be more successful when a variety of aquatic resource types are included in the project; and establishes standard compensatory mitigation plan elements (goals, success criteria, monitoring, maintenance, contingencies, etc.) that will increase the likelihood that a mitigation plan will achieve full ecological success. These considerations are just as pertinent to consolidated mitigation approaches as they are to project-specific mitigation. RGL 01-1 also states that, at least in the case of individual permits, the USACE will accept a permit applicant's proposal to use a mitigation bank or ILF arrangement for compensatory mitigation if that proposal would provide "appropriate and sufficient" compensation.

In-Lieu Fee Mitigation Basics

As defined in the federal ILF guidance, ILF mitigation "occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank approved under the Banking Guidance." An ILF sponsor is typically an organization with demonstrated competence in natural resource management, such as a local land trust, private conservation group, or governmental natural resources management agency. The ILF paid by a permittee represents the cost to the sponsor to replace those aquatic ecosystem functions that would be lost or impaired as a result of the permittee's activity. ILFs are deposited and held in a sponsor-managed trust fund until they can be used to finance USACE-approved mitigation projects.

ILF mitigation is primarily used to compensate for minor adverse impacts to the aquatic ecosystem, such as those authorized by general permit. Compensation for projects that result in more substantial adverse impacts, such as those requiring authorization by standard individual permit, is usually provided by project-specific (e.g., on-site) mitigation or the purchase of mitigation bank credits. ILF mitigation can provide effective compensation in a wide variety of situations, such as when:

- the amount of compensation required is too small to justify the relatively high design, implementation, and follow-up costs of small project-specific mitigation projects;

- sufficient space for on-site or nearby off-site project-specific mitigation is not available;

- project-specific mitigation would result in a relatively low-performing aquatic resource (caused by such factors as small size, unfavorable location, inadequate hydrology, limited vegetation development potential, incompatible land use patterns on adjacent areas, and long-term mitigation area management limitations); or

- additional mitigation is needed to supplement project-specific mitigation that would not, by itself, fully compensate for the project's adverse environmental impact.

Mitigation banking and ILF mitigation share many more similarities than differences. For example, both approaches must comply with all USACE mitigation policies and procedures (e.g., mitigation sequencing, USACE preference for on-site/in-kind compensation, and USACE preference for restoration over creation, enhancement or preservation), even when they are generally preferred over other types of mitigation, as in the case of nationwide permits. In addition, mitigation banks and ILF-funded mitigation projects both require written implementing agreements that include detailed plans, performance standards, success criteria, financial assurances, and other measures, as appropriate, to ensure their ecological success.

The fundamental difference between mitigation banking and ILF mitigation lies in the timing of the implementation of the environmentally beneficial activities associated with each approach. With mitigation banks, those activities are conducted in advance of the project-related impacts that would be compensated for by a bank. With ILF mitigation, those activities are not necessarily conducted in advance of project-related impacts. In some cases, a detailed timetable for conducting future ILF-funded mitigation may not even be established in advance of project-related impacts. However, quickly expending collected ILFs to fund mitigation projects is generally a high priority in any ILF program, and ILF program implementing agreements typically include deadlines and general procedures for expending collected ILFs.

Establishing an In-Lieu Fee Program in Seattle District

Initial resource agency discussions about a Seattle District ILF program have drawn encouraging responses and general agreement that a sensible partner (ILF program sponsor) for the USACE would be The Nature Conservancy of Washington. The Nature Conservancy has shown great interest in participating in ILF programs in other states and clearly has the financial, land management, and biological expertise to effectively partner with the USACE in Washington. While it is too early to predict the specific form or features of a Seattle District ILF program, the basic goals of the program would be to: (1) increase the overall quality of compensatory mitigation over that typically achieved by project-specific compensatory mitigation for minor-impact projects and (2) provide Department of the Army permit applicants a new tool for effectively compensating for the adverse environmental impacts of their projects.

Typically, an ILF program sponsor manages the program trust fund, determines a reasonable fee schedule, helps identify potential ILF-funded mitigation opportunities, and develops proposals for ILF-funded mitigation projects. The sponsor also maintains a written record of all collected ILFs and reports to the USACE on the status of the trust fund and ILF-funded projects. Normally, no trust fund assets can be expended by the sponsor without prior USACE approval except those assets necessary to reimburse the sponsor for reasonable administrative and operational expenses (as typically provided for in an ILF program implementing agreement).

Other entities, such as local land trusts, could also propose and implement ILF-funded mitigation projects by coordinating their projects through the sponsor. The sponsor would conduct an initial review of each project proposal (i.e., evaluate the practicability and suitability of the project in light of ILF program needs) and refer promising projects to the USACE for further review.

The USACE, ILF program sponsor, and other ILF program participants (e.g., interested natural resource agencies) would periodically review the status of the trust fund, fee schedules, mitigation ratios, already-constructed mitigation projects, and other elements of the ILF program and make adjustments as necessary to ensure the continued success of the ILF program.

FAQs

1. Hmmm, permit applicants writing a check rather than conducting on-site mitigation projects… isn't that cheating?

   An ILF program indeed can provide what, at first blush, might appear to be an "easy out" for permit applicants. However, before the USACE would allow an applicant to pay an ILF, other forms of compensation should already have been considered and determined to be either impracticable or less beneficial to the aquatic environment. Payment of an ILF is, in many cases, the mitigation option of last resort.

   In addition, ILF mitigation, as with other forms of consolidated mitigation, has inherent benefits that typically do not accrue with project-specific mitigation. For example ILF-funded mitigation projects are often much larger than project-specific mitigation projects and so benefit from economies of scale. Also, ILF-funded mitigation project sponsors are more likely to be experienced in mitigation project implementation and far more interested in ensuring the success of the mitigation project.

   And remember, compensatory mitigation should never be construed to be an applicant's "punishment" for having a project with adverse environmental impact but, rather, as fair and appropriate repayment of lost aquatic ecosystem functioning. The fact that ILF mitigation can be expeditious for the applicant is simply an incidental benefit of ILF mitigation that neither reduces its utility to the regulatory program nor its benefit to the aquatic environment.

2. But what happens when everybody and their uncle wants to pay an ILF rather than going through the hassle of designing and implementing project-specific mitigation?

   Some permit applicants may initially view ILF mitigation as an opportunity to "take advantage of the system." However, the use of ILF mitigation, like any form of compensatory mitigation, is subject to USACE approval. And that approval is contingent upon the applicant being able to demonstrate to the satisfaction of the USACE that paying an ILF would both be in the best interest of the environment and comply with all USACE regulations and policies.

3. Doesn't ILF mitigation compete with mitigation banks and project-specific compensation?

   While each form of compensatory mitigation may occasionally "compete" with one or more of the other forms, project-specific circumstances will generally dictate which form would provide the "best deal" for the environment. Department of the Army mitigation policy also helps reduce potential competition by requiring applicants to normally consider on-site mitigation, nearby off-site project-specific mitigation, mitigation banking, and ILF mitigation, in that order.

4. So how would ILF mitigation work in Seattle District?

   In general, an applicant proposing to conduct ILF mitigation would propose to do so in a compensatory mitigation plan submitted to the USACE. The mitigation plan would be reviewed by a USACE project manager for appropriateness, practicability, and compliance with applicable regulatory program laws, regulations, and policies. If the project manager determines that ILF mitigation would be in the best interest of the aquatic environment and comply with all regulatory program requirements, the project manager will notify the applicant that the mitigation plan is acceptable and provide instructions on how to remit the ILF payment.

5. How much money would a permit applicant pay for ILF mitigation, and who would determine the amount to be paid?

   The size of an ILF is commensurate with the type and amount of compensatory mitigation required. If the ILF mitigation is a small component of a larger mitigation plan or it would compensate for a project with minimal adverse impact, the fee would be relatively small. Conversely, an ILF that compensates for an entire project or for a project that affects high quality aquatic resources could be fairly large. In any case, the size of an ILF is simply the expected cost to the ILF program sponsor to conduct, in the applicant's behalf, the type and amount of mitigation necessary to compensate for the loss of aquatic ecosystem functions expected to result from the applicant's project.

   Determining the amount of the ILF is a relatively simple and straightforward process:

   - For each ILF mitigation proposal, the USACE project manager would apply local ILF program mitigation guidance, project-specific considerations, and best professional judgment to determine how many units (acres or linear feet) of ILF-funded mitigation would be required to compensate for a project's likely adverse impact on the aquatic environment. This step is essentially the same as calculating the amount of on-site mitigation that would be required for a project, a determination that project managers already make regularly.

   - As part of the ILF program implementation process, the sponsor will estimate its approximate per-unit cost (acres of wetland, linear feet of stream) to implement various types of mitigation projects that it might conduct in the ILF program service area. (Types of mitigation projects for which a sponsor might estimate costs include replanting a formerly forested wetland, enhancing a degraded urban stream, restoring wetland hydrology and native vegetation to levee-protected farmland, and preserving a regionally significant forested wetland). The sponsor would provide these per-unit costs to project managers, perhaps in the form of a simple schedule of costs. This schedule might include such per-unit costs as: $55,000 per acre for emergent wetland enhancement, $125 per linear foot for stream restoration, and $8,000 per acre for forested wetland preservation. In the second step, the project manager would simply reference the schedule to find the per-unit costs of each type of compensatory mitigation determined to be appropriate in the first step.

   - In the final step, the project manager simply multiplies the number of units of ILF-funded mitigation that would be required for compensatory mitigation (first step) by the appropriate per-unit cost from the schedule (second step) to determine the amount of the ILF.

   In many cases, a permit applicant or the applicant's consultant, having obtained the current per-unit cost schedule and ILF program mitigation ratio guidance, should be able to determine an acceptable ILF and include that in the applicant's mitigation plan.

6. What if the applicant disagrees with the amount of the ILF or doesn't pay the agreed-upon ILF?

   An applicant who disagrees with the USACE on the size of the ILF is free to propose and seek USACE approval of an alternative mitigation plan that meets regulatory program requirements.

   Payment of an ILF, like the implementation of any other mitigation plan, is generally a special condition of the authorization. If the permittee does not pay the agreed-upon ILF by the deadline specified in the special condition, the permittee is in violation of the terms and conditions of the authorization and subject to normal regulatory program enforcement provisions.

7. How would an ILF program benefit regulatory project managers?

   Every project manager has struggled with projects that seemed to present no practicable opportunity to provide ecologically meaningful compensatory mitigation. There may not be sufficient space in the project area to conduct on-site mitigation or, if there is sufficient space, there may be little or no opportunity to conduct mitigation of any real consequence. In other cases, the small amount of compensation that would be required does not justify the high costs of mitigation plan design, implementation, and follow-up. In order to complete the permit process in these situations, project managers may "settle" for a lesser amount or lower quality compensation, or, in cases that involve very small amounts of compensation, perhaps none at all. (Of course, this flexibility is available only to the extent allowed by regulatory program regulations and policy.) In these difficult situations, ILF mitigation can provide the project manager a means to complete the permit process in a more timely manner while simultaneously securing an appropriate type and amount of higher quality compensation

Additional Reading

Draft Nationwide Permit Questions and Answers, February 13, 1997. (Question 10).

Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605-58614). November 28, 1995.

Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (65 FR 66914-66917). November 7, 2000.

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Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (45 FR 85336-85357). December 24, 1980.

Memorandum of Agreement (MOA) between the EPA and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines. February 6, 1990.

Memorandum for Record, Regulatory Teleconference, May 14, 1997.

Scodari, Paul and Leonard Shabman. *Review and Analysis of In Lie Fee Mitigation in the CWA Section 404 Permit Program*. Virginia Water Resources Research Center. November 2000.

Feel free to contact me with your comments, concerns, and additional questions!

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